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Supreme Court of the United States

OCTOBER TERM [redacted] 1925

No. [redacted] 122

SAMUEL A. MYERS and HARRY MYERS
AS S. A. & H. MYERS,

Petitioners,

v.

INTERNATIONAL TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN R. LAZENBY,
For the Respondent.

May, 1925.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The judgment of which complaint is made is against Samuel A. Myers individually and against Harry Myers individually. There is no judgment against the firm of S. A. & H. Myers.

This petition for certiorari is brought by the firm of S. A. & H. Myers. The firm is not aggrieved by any judgment and has no standing in this Court. There is no petition brought by the individuals before this Court.

Prior to October, 1916, the two Myers conducted a clothing business as a partnership under the firm name of S. A. & H. Myers, with a place of business at #36 Otis Street, Boston, Mass.

Beginning with October 2nd, 1916, and ending December 18th, 1916, the partnership borrowed $20,000. from the International Trust Company, giving a series of ten notes, each for $2,000.00.

The notes were drawn, "Four months after date we promise to pay to the order of ourselves" and were signed "S. A. & H. Myers." They were endorsed on the back, "S. A. & H. Myers, S. A. Myers, Harry Myers". (Exhibit 1.)

S. A. Myers personally endorsed all ten; Harry Myers endorsed nine.

On January 27th, 1917, an involuntary petition in bankruptcy was filed against the partnership alleging an act of bankruptcy by the partnership. (Exhibit 2). On February 10th, 1917, partnership schedules were filed (Exhibit 3) and also a petition for a meeting of creditors to consider a composition which was to be proposed, and on March 3rd, 1917, an offer in composition was filed (Exhibits 4 and 5). On March 23, 1917, a petition to confirm the composition was filed in which it was stated they had filed a list of creditors and on May 28th, 1917, the composition was confirmed (Exhibits 6 and 8).

There was no adjudication and no trustee was appointed.

From an examination of the involuntary petition and schedules (Exhibits 2 and 3), [which are to be filed in their original form with the record and petition] it appears that the involuntary petition was against the partnership; that the schedules were endorsed "Debtor's schedules, Samuel A. Myers and Harry Myers as S. A. & H. Myers of Boston, Mass., residence 36 Otis Street"; that the International Trust Company was listed among the firm creditors for $20,000., on notes; that the petitioners individually filed no schedules of individual assets and liabilities, but expressly swore that they had no individual debts. The debt of the petitioners arising out of the individual endorsement of the notes was in no way scheduled.

The Trust Company brought this suit against the individuals to recover upon the endorsement of the notes by each of the individuals.

The theory on which this petition is brought is that the Trust Company is trying to hold the petitioners for the balance of a firm liability which was discharged by the confirmation of the composition; that the Massachusetts Court has refused to give effect to the discharge from the firm debts. It appears in the title to the petition and in the fact that the petition for certiorari is brought by the firm. It permeates the whole petition and brief and has led to the citation of cases which have no application to the question of law before the Massachusetts Court.

The Massachusetts Court has in no way attempted to deny the benefit of the discharge from the firm debts.

The petition states: "The composition was confirmed, resulting in a discharge in bankruptcy. The plaintiff sued, claiming to avoid the discharge and prevailed in the Supreme Judicial Court of Massachusetts (241 Mass. 509). The Supreme Court of the United States reversed this decision, and held that the discharge was a bar (263 U. S. 64). The plaintiff now claims that it is not a bar to individual liability of Samuel A. Myers and of Harry Myers. This is the claim which has failed in the Superior Court and prevailed in the Supreme Judicial Court of Massachusetts."*

From the record in *Myers* v. *International Trust Company*, 263 U. S. 64, it appears that when the

* Reference to pages of the record cannot be given, as the respondent had received no printed copy at the time this brief was written.

Myers offered their composition, the Trust Company objected on the ground that when they obtained the loans from the Trust Company, the Myers had submitted a financial statement in which the accounts receivable were set out as some $58,000, while in fact, they had assigned these accounts receivable to the Commercial Investment Trust, under an arrangement whereby they were paying at least 16% interest on the loans.

The Referee to whom the objections were sent, found that the statement was a true copy from the books and was not false and recommended the confirmation of the composition. The District Court confirmed the composition.

The Bank thereafter brought suit in the Massachusetts Superior Court to recover damages suffered by reason of being induced to lend money by representations as to the financial condition made in the statement, which representations were false. At the trial, the Myers offered in evidence the record in the Bankruptcy Court. On the authority of *Friend* v. *Talcott*, 228 U. S. 27, the Trial Court excluded the record. The jury brought in a verdict for the plaintiff.

The Myers then took the case to the Supreme Judicial Court of Massachusetts on exceptions and that Court on the same authority, dismissed the exceptions (241 Mass., 509).

On certiorari, this Court reversed the Massachusetts Supreme Court on the ground that the issue of whether the statement was false was the same and controlling in both suits—the composition and the action in the State Court—and because it was decided against the Trust Company in the first suit, the decision concludes the issue against the Company in the second suit. In other words, the Trust

Company was estopped by the decision of the referee as to the falsity (263 U. S. 64, 77).

There was no decision that the discharge granted in the Bankruptcy Court was a bar to an action of tort to recover damages suffered because of money being obtained by reason of a materially false statement intentionally made.

The present suit is against each individual to recover upon the individual endorsements on the notes on the ground that the Myers made no offer to their personal and individual creditors, but deliberately excluded them from the composition proceedings.

This is an entirely different situation from that set out in the above quotation.

ARGUMENT.

The petitioners in their petition and brief insist that the Trust Company had only one claim, that against the partnership.

When the Bank received the notes, it received two separate and distinct obligations:

1. The promise of the firm to pay the notes as maker.

2. The promise of Samuel A. Myers and of Harry Myers, as individuals, to pay the notes if the firm did not, by reason of the endorsements.

In bankruptcy the Trust Company had two rights:

a. To prove against the firm assets and receive the dividend that firm creditors might get.

b. To prove against the individual assets and receive the dividend that individual creditors might get.

In re Frazer, 221 Fed. 83;
In re McCoy, 150 Fed. 106 (C. C. A. 7th), affirmed under title of *Chapman, Trustee,* v. *Bowen,* 207 U. S. 89;
Reynolds v. *New York Trust Co.,* 188 Fed. 611 at page 613 (C. C. A., 1st);

See also

Robinson v. *Seaboard National Bank,* 247 Fed. 667, 669; affirmed on motion for rehearing 247 Fed. 1007 (C. C. A., 3rd).

This error that the Trust Company had only one claim has led the petitioners to cite cases which are no authority for the granting of this petition.

In *Abbott* v. *Anderson,* 265 Ill. 285, where a firm creditor proved against the firm assets and then sought to recover the deficiency from the individual estates, "The sole question of law was whether the discharge of the partnership in bankruptcy discharged the partners, individually, from the partnership debts" (page 286).

Bear v. *Liberty National Bank,* 285 Fed. 703 (C. C. A., 3rd), was reversed by this Court on certiorari under the title *Liberty National Bank* v. *Bear,* 265 U. S. 365.

In *Liberty National Bank* v. *Bear, supra,* at page 368, it is said:

> "Upon the question whether the adjudication of the bankruptcy of a partnership involves an adjudication of the bankruptcy of the individual partners, there appears to have been a diversity of opinion in the lower federal courts.

> The decision in *Francis* v. *McNeal*, 228 U. S. 695, upon which the Circuit Court of Appeals chiefly relied, did not involve a determination of this direct question."

In *in re Forbes*, 128 Fed. 137, the only question was whether a firm could be insolvent and the partners not.

The cases relied upon by the petitioners have no bearing whatever upon the question of law passed upon by the Massachusetts Court. The offer was made before there was any adjudication and the question of insolvency of the firm did not come up. There is no conflict between the decision of the Massachusetts Court and the statutes and decisions cited in the petition and brief.

In *Nassau Works* v. *Brightwood Co.*, 265 U. S. 269, at page 271, it is said:

> "Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of, the bankruptcy proceedings."

The decision of the Massachusetts Court does not deprive the petitioners of any right, privilege and immunity under the Constitution and Statutes of the United States.

In *Cumberland Glass Company* v. *DeWitt*, 237 U. S. 447, at page 453, it is said:

> "The nature of composition proceedings is nowhere better stated than by Judge Lowell in *In re Lane*, 125 Fed. Rep. 772, 773, in which it is said:
>
> 'The case of composition is in some respects exceptional. *It is a proceeding voluntary on*

both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. *The creditors may accept this offer or they may refuse it.* For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary. Section 12-e (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides: "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." Composition is thus treated, even in the act, as in some respects outside of bankruptcy. In the ordinary case of distribution by a trustee, the debtor's whole property, save that which is exempt, is applicable to the payment of his debts and belongs to his creditors, and not to him, until their claims have been satisfied. After adjudication there is no voluntary offer to pay by the bankrupt, and no *bargained* release by the creditor. The creditor takes all the debtor's property whether the debtor likes it or not. * * * The bankrupt's rights of property arise only in the event of a payment of his creditors in full. If a creditor will not prove his claim, the bankrupt does not take that creditor's share, but it goes to swell the dividends of creditors more diligent. Section 66 of the act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3448]) has the same purpose, and does not apply to composition. But if the composition is paid the creditors have no further

claim upon the debtor or his property. *In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more.'"*
(Italics are counsel's.)

See

Nassau Works Company v. *Brightwood Co.*, 265 U. S. 269.

A composition is in derogation of the common law and compels any dissenting creditor to accept the dividend satisfactory to the majority.

In re Kinnane Co., 221 Fed. 762, 766.
In re Goldstein, 213 Fed. 115, 116.

"A law which compels a creditor, against his will, to accept in discharge of his debt just what the debtor sees fit to offer, should be strictly construed (Loveland, Bankr., p. 549; *In re Shields*, Fed. Cases No. 12784)."

In re Rider, 96 Fed. 808 at 809.
In re Frear, 120 Fed. 978, 980.
In re Kinnane Co., supra.

From these authorities, it is evident that the discharge granted by a composition is not "coextensive with the discharge which they would receive in the ordinary course of bankruptcy," as the petitioners urge. The discharge can go no further than to the debts which the debtor offers to pay.

The question comes down to a very simple one. To what creditors was an offer made?

It is urged that these petitioners had no liabilities except those set out as liabilities of the partnership.

The facts show that they had individual debts which could no more be proved against the partner-

ship assets than can a claim for income tax of the individual partners as in *United States* v. *Kaufman*, 45 S. C. R 322.

It is argued that no class of creditors, firm or individual is mentioned in the petition, and in all the surroundings, there is nothing to indicate that these men meant only firm creditors. It is also argued that they offered the composition to all of their creditors, firm and individual.

A reading of petition and schedules (Exhibits 2 and 3) shows only that firm debts were involved. The endorsements on the schedules show the schedules to be those of the firm of S. A. & H. Myers. The offer (Exhibit 5) recites that the Myers filed a list of their creditors and they offered to pay those creditors. There was only one list—that of firm creditors. There can be no question, as Massachusetts Court has found, that the debtors incorporated the schedules into their offer. There is not one word in the entire record in the bankruptcy proceedings which shows that the International Trust Company was listed as a creditor of the individuals. The oath that they had no such creditors rebuts any argument that they intended to include the individual debts.

These debtors wished to escape whatever disgrace there may be from going through bankruptcy. They prepared a list of creditors to whom they wished to make an offer and made that offer to that list. The Bankruptcy Court confirmed the offer and by such confirmation, imposed a bargain upon the creditors who were listed, whether such creditors wished to enter into a bargain or not. The Myers deliberately withheld from the Court their individual debts and obligations. As a bargain is predicated upon an offer, none can be created if no offer is made.

The Massachusetts Supreme Court has not refused to give effect to a discharge in bankruptcy, nor does its decision conflict with the decisions of the Federal Courts. On the contrary, it expressly follows the principles laid down in *Cumberland Glass Co.* v. *DeWitt*, 237 U. S. 447. It also follows long established law of Massachusetts as laid down in *Hewes* v. *Rand*, 129 Mass. 519; and in *Stone* v. *Simonds*, 131 Mass. 457. This law has never been questioned.

The petition should be denied.

Respectfully submitted,

JOHN R. LAZENBY,
For the Respondent.

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SUPREME COURT OF THE UNITED STATES

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No. [redacted] 122

SAMUEL A. MYERS AND HARRY MYERS
AS S. A. & H. MYERS,
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v.

INTERNATIONAL TRUST COMPANY,
Respondent.

MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION

An inspection of Exhibit 2 (the creditors' petition in bankruptcy) and of Exhibit 3 (the debtors' schedules) adds nothing of value to the description of these exhibits contained in the record and briefs already submitted to this Court. From the memorandum in support of motion for reconsideration, the only matters in these exhibits which the respondent's counsel seems to regard as material are that a petition in bankruptcy was filed against the partnership in the United States District Court for the District of Massachusetts, and that debtors'

schedules were filed in which the debtors swore that they had no individual debts and set out the International Trust Company as a creditor to the extent of $20,000 for notes and that the Trust Company was not listed as a creditor on account of the endorsements.

The language of the creditors' petition is set out verbatim in the petition for certiorari (page 4). The form and substance of the schedules are accurately set out in the petition for certiorari (page 4). The petition there shows that Schedule A (which was the one which contained the debts of the partners) contained the debt to the International Trust Company as a creditor on the notes, and that Schedules C and E (which were designed for the individual debts) had against them "that he has no individual debts."

To the same effect is the description of this petition and these schedules in the brief in support of the petition for certiorari (page 4 to 6).

The brief for the respondent in opposition to the petition for certiorari contains a similar description of both the petition and the schedules (pages 2, 3). It contains no suggestion that there is anything else of importance in them.

The transcript of the record as filed showed that the creditors' petition and the debtors' schedules were to be deemed a part of it (Table of Contents, ante pages 1, 35). This record gave a detailed description of these two exhibits (Record, pages 10, 11, 13, 14, 29, 30, 31, 32).

There was no thought on the petitioners' part or on the part of their counsel, to suppress these exhibits. If it is the desire of the respondent's counsel that the Chief Justice and the Justices of the Supreme Court should, by inspection of these exhibits, verify the concurrent description of them contained in the petition for certiorari, the briefs of the parties, and the transcript of record including the opinion of the Supreme Judicial Court of Massachusetts, it is regrettable that the exhibits were not forwarded at an earlier date; but these exhibits put the Court in possession of no fact which was not

fully before it when the petition for certiorari was granted on June 1st, 1925.

The motion for reconsideration should be denied.

Respectfully submitted,

EDWARD F. McCLENNEN,
For Petitioners.

June 17, 1925.

I have received a copy of the foregoing memorandum.

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Attorney for Respondent.